

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

White Hawk/Todd, A Joint Venture

SBA No. SIZ-4950

Appellant

Decided: May 1, 2008

Re: DMS-All Star Joint Venture

Appealed from

Size Determination No. 6-2008-033

ORDER VACATING REMAND ORDER AND DISMISSING APPEAL¹

I. Background

On March 9, 2007, the U.S. Department of the Army, Ft. Sam Houston, Texas issued RFP No. W9124J-06-R-0031 (RFP) as a total competitive 8(a) small business set-aside.

On November 30, 2007, the Contracting Officer (CO) notified unsuccessful offerors of award to DMS-All Star Joint Venture (DMS JV), a joint venture comprised of Diversified Maintenance Systems, Inc. (DMS) and All Star Services Corporation (All Star). The SBA approved a mentor-protégé agreement between All Star (mentor) and DMS (protégé) on January 12, 2006. Their last annual review was completed June 22, 2007, when their Mentor-Protégé Agreement was approved for another year.

On December 7, 2007, White Hawk/Todd, A Joint Venture (Appellant) filed a size protest. Appellant alleged DMS and All Star were not operating as joint venturers under an approved mentor-protégé agreement at the time of proposal submission, April 27, 2007. Appellant asserted All Star violated 13 C.F.R. § 124.520(b)(2) by attempting to simultaneously act as a mentor of two protégés in direct competition with each other. Moreover, Appellant contended that DMS does not qualify as a protégé under 13 C.F.R. § 124.520(c) because (1) DMS is not in the developmental stage of 8(a) program participation; (2) DMS has received an 8(a) contract; and (3) DMS's size is more than half the size standard corresponding to its primary SIC Code. Accordingly, Appellant alleged that without a legitimate mentor-protégé

¹ OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA.

relationship, DMS and All Star are affiliates and DMS JV is other than small for the instant procurement. Finally, Appellant argued that DMS JV failed to maintain a bona fide place of business in Oklahoma as required by the solicitation.

On December 28, 2007, the Small Business Administration's (SBA) Office of Government Contracting, Area VI Office (Area Office) dismissed Appellant's protest for lack of standing and specificity. After finding a lack of standing and specificity, the Area Office concluded Appellant's allegation that DMS JV did not have a legitimate mentor-protégé relationship was beyond the scope of a size protest.

On January 14, 2008, Appellant appealed the Area Office's dismissal of its size protest with the SBA Office of Hearings and Appeals (OHA). On February 7, 2008, I issued *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4888 (2008) (Remand Order), vacating the Area Office's dismissal and remanding the case to the Area Office. I found Appellant had standing to file a protest and its protest was sufficiently specific. I remanded the case to the Area Office to review Appellant's allegations that All Star did not meet the requirements of 13 C.F.R. § 124.520(b) and DMS did not qualify as a protégé because it failed to satisfy the requirements of 13 C.F.R. § 124.520(c).

On March 25, 2008, the Area Office issued a size determination upon remand finding DMS JV meets the mentor-protégé requirements of 13 C.F.R. §§ 124.520(b)(2), (c)(1) and is a small business for the instant procurement. On April 9, 2008, Appellant appealed the size determination upon remand to OHA.

II. Analysis

After reviewing the SBA's 8(a) regulations and the responses to the appeal petition, I have decided to vacate my February 7, 2008 Remand Order because I should not have found the Area Office had subject matter jurisdiction over Appellant's protest allegation regarding DMS JV's compliance with SBA's mentor-protégé regulations.²

Whether a protégé firm meets the requirements of 13 C.F.R. § 124.520(c) or a mentor firm meets the requirements of 13 C.F.R. § 124.520(b) is a determination vested solely with the SBA's Director, Office of Business Development (D/BD). 13 C.F.R. § 124.520(e)(2). The regulations do not authorize the area offices to play a role in the approval or review of mentor-protégé agreements. 13 C.F.R. § 124.520.

The area offices', and thus OHA's, lack of jurisdiction to consider protests where compliance with SBA's mentor-protégé regulations is at issue is strengthened by 13 C.F.R. § 124.517, which states, in relevant part:

Can the eligibility or size of a Participant for award of an 8(a) contract be questioned?

² I note that the issue of Appellant's standing to file a protest and the protest's specificity is irrelevant given the lack of subject matter jurisdiction over Appellant's allegations.

(a) The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.

...

(e) Anyone with information questioning the eligibility of a Participant to continue participation in the 8(a) BD program or for purposes of a specific 8(a) contract may submit such information to SBA under § 124.112(c).

Because the RFP is a competitive 8(a) small business set-aside, DMS JV's compliance with the mentor-protégé regulations, and thus its eligibility for the competitive 8(a) requirement, may not be challenged by Appellant under 13 C.F.R. § 124.517.

In holding that an area office and OHA may not review mentor-protégé eligibility issues, I note that anyone with concerns with an 8(a) Participant's mentor-protégé agreement may raise these concerns with the 8(a) BD program office. 13 C.F.R. §§ 124.112(c), 124.517(e). Further, the SBA 8(a) BD program office monitors mentor-protégé relationships as part of its annual review of 8(a) participants. 13 C.F.R. § 124.520(f). Thus, a concerned party is not without recourse.

III. Conclusion

Accordingly, I VACATE my February 7, 2008 Remand Order and hold that Appellant failed to submit a justiciable protest to the Area Office and AFFIRM the Area Office's December 28, 2007 dismissal of Appellant's protest. Similarly, Appellant's appeal of the size determination upon remand is outside OHA's jurisdiction and must be DISMISSED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge